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Supreme Court, U.S.
FILED

05-216 JUL 29 2005

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

DEBRA DANTZ,
PETITIONER

v.

AMERICAN APPLE GROUP, LLC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. An at-will employee and her employer must reach a mutual agreement to arbitrate employment claims, manifested by a "clear and unmistakable waiver" standard.

2. Waivers of the right to trial by jury in the at-will employment setting must be "knowing and voluntary."

3. If there is any question of contract formation under the FAA, then it must be resolved pursuant to a limited trial by jury, as dictated in § 4 of the FAA, applying principles of state law.

4. *Arguendo*, if an agreement to arbitrate is found, the voluntary invocation of a federal court's jurisdiction by removal constitutes a waiver of any right to an arbitral forum when a case is originally filed in a court of competent jurisdiction able to decide the issue of arbitrability.

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The March 1, 2005 opinion of the United States Court of Appeals for the Sixth Circuit is unreported, and cited as 123 Fed. Appx. 702, 2005 U.S. App. LEXIS 3454 (6th Cir. March 1, 2005), and is reprinted at Appendix (App.) 1a. The July 21, 2003 order of the United States District Court for the Northern District of Ohio, Eastern Division is cited as 277 F. Supp 2.d 794 and is reprinted at App. 18a.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its decision on March 1, 2005; the Petitioner petitioned for an additional 60 days in which to respond, which was granted by this Court. Petitioner has timely filed this petition within 180 days of March 1, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of the Federal Arbitration Act, specifically (FAA), 9 U.S.C. § 3 , 9 U.S.C. § 4, 28 U.S.C. § 1441, 29 U.S.C. § 206(b), O.R.C. 4112.02 *et seq.* and 4112.99. The statutory provisions are reprinted at App. 47a.

STATEMENT OF THE CASE AND FACTS

Petitioner Debra Dantz is a single mother of two adopted daughters. She has a high school education. For most of her adult life she was married and a homemaker. In 1999 her husband divorced her, which became final in approximately 2000, and left her to raise her two

daughter alone. Her ex-husband disappeared from the picture and never paid child support, nor did she have funds or a pension from which to draw. She had no car. In addition, her father was dying of cancer at the time and she was trying to care for him.

In August 2000 Petitioner, who had virtually no working experience, began working as a server at Applebees restaurant in Chapel Hill, Ohio, which was owned and operated by Respondent. At that time, Respondent did not have any sort of "Dispute Resolution Program" or arbitration agreements with its employees.[1]

From the start, Petitioner was subjected to severe and pervasive mistreatment by the restaurant's general manager, who was also her direct supervisor. The manager groped, sexually harassed and ridiculed Petitioner, and encouraged other male workers to do so as well. On slow days he would force her to sit in the middle of the restaurant, sometimes for over an hour, while he circled her, staring at her. He and fellow managers berated her in front of customers, such that co-workers and even some customers complained on her behalf. Petitioner herself complained numerous times both verbally and in writing about the harassment, but to no avail.[2]

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[1] Respondent is headquartered in Cleveland, Ohio and operates Applebees franchises in Ohio, Indiana, Delaware, and Seattle.

[2] Other women workers at the restaurant were also harassed, though none as severely as Petitioner. Respondent was well aware of conditions at the restaurant due to many complaints about the hostile environment at the restaurant, both on its anonymous "help" line and directly to headquarters, yet did nothing.

The manager required Petitioner to work six days per week from open to close – while "zeroing out" her hours on the computer time-keeping system so that she only made tips. In turn, he received manager bonuses from Respondent's corporate headquarters for "keeping labor costs down." Petitioner's yearly income was less than $10,000 despite the number of hours she worked.

Petitioner's financial situation and lack of a car required that she find unskilled employment within walking distance of her home; she also needed the rudimentary health benefits Respondent offered. The Chapel Hill Applebees restaurant was near enough that she could reach it on foot. When she returned from work each night, she slept on the floor of her home because she did not own a bed. (Her teenage daughters shared the lone bed and finally pooled their allowances together over a year's time to buy Petitioner a bed for Christmas 2001).

The manager was aware of her financial situation and continued to exploit it. Petitioner complained numerous times to other managers at the restaurant, to the District Manager over the harassing manager, and to corporate headquarters. Her complaints continued to be ignored. However, the manager and other male workers at the restaurant began to retaliate against her for complaining about them by threatening and intimidating her. For example, they began to fling food at her when she entered the kitchen, held up her orders, and consistently gave her the worst working stations. The manager began cutting down her hours while still zeroing them out, so that she made fewer dollars in tips.

Nonetheless, Respondent did nothing. Indeed, it continued to employ the manager at the restaurant even

after it was aware of his conduct. When confronted, the manager admitted to "zeroing" Petitioner's hours and falsifying payroll information, and also to having a cocaine problem. It was widely known at Respondent's headquarters that he was extremely temperamental, unpredictable, and used intimidation as part of his "management style."[3]

In Fall 2001, Respondent adopted a "Dispute Resolution Program," ("DRP") which was a progressive four-step process for resolving disputes with the Respondent, including: 1) "Communication" (talking to one's supervisor and progressively upward); 2) "Executive Review" (company's president or designee becomes involved); 3) "Mediation"; and 4) "Arbitration."

In September 2001, the Respondent claims it distributed a letter from the management company president (who was not the owner of the company or employer of the employees) stating that Respondent was adopting the "forthcoming" arbitration program, that the employees would receive specific information about it soon, and that the employees would "manifest their assent to the agreement by continued employment" if they showed up to work on October 1, 2001 – despite not having any information about the DRP at all. Moreover, as it turns out in subsequent litigation, the Respondent falsely stated the management company's letter (which became known in litigation as the "Strang memorandum),

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[3] The manager was transferred a few months after Petitioner filed suit and then was ultimately fired for "altering payroll records." At the initial case management conference before the district court, the Respondent admitted it had an "exposure" on Petitioner's wage claim.

was actually distributed to employees, when in fact it had not been distributed.[4]

Later in September 2001, Respondent distributed booklets to Chapel Hill Applebees employees, which explained the DRP. However, the last two pages of the booklet, which were designed to be torn out or removed and saved as executed instruments for the Respondent, comprised an "*Agreement and Receipt for Dispute Resolution Program.*" The booklet contained a six-page discussion of the process for using the four steps of the DRP and laid out the types of claims covered by binding arbitration. The first page of the Booklet stated:

> THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY.

Nowhere did the booklet or the two-page agreement state that the DRP requirements were automatically effective if the employee continued her employment after the date of receipt, nor did it explain that the employee was expected to quit her employment if she rejected its terms.

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[4] Respondent was basically free in this case to invent its defense, since the district court denied Petitioner her discovery rights on the issue of formation. She was able to obtain the proper information in a later federal proceeding but the Sixth Circuit refused to consider it, despite knowing there was a much more developed – and reliable – record. See *Dantz v. Apple American Group*, N.D. Ohio, No. 5:04 CV 0060.

More important, the attached agreement made acceptance of the DRP elective. The agreement spelled out the actual terms of the "mutual promise to arbitrate" and expressly required signatures of both the employee and an authorized company officer in order to be effective.

The agreement stated, in pertinent part (emphasis added):

> **MUTUAL PROMISE TO RESOLVE CLAIMS BY BINDING ARBITRATION**
>
> In signing this Agreement, both the Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration . . . . I understand and agree that by entering into this Agreement, I anticipate gaining the benefits of a speedy, impartial dispute resolution procedure.
>
> This procedure is explained in the Dispute Resolution Program Booklet, which I acknowledge I have received and read or have had an opportunity to read.
>
> * * *
>
> **SOLE AND ENTIRE AGREEMENT.** This Agreement and the Dispute Resolution Program are the complete agreement on the subject of arbitration of disputes. This Agreement takes the place of any other verbal or written understanding on this subject. No party is relying on any